92-1203

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTHONY F. DIANDRE and
METRO DENVER MAINTENANCE CLEANING, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the IRS can unilaterally nullify the confidentiality of tax return information, as required in Sec. 6103 of the Internal Revenue Code, by inadvertently including in IRS inquiry letters sent to third parties a request for information on possible cash payments made to Petitioner, even though the IRS had no suspicion cash payments were being received by Petitioner and even though the IRS did not expect to obtain any such information.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Metro Denver Maintenance Cleaning, Inc.[1] respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, entered on July 7, 1992.

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[1]Petitioner Metro Denver Maintenance Cleaning, Inc. is a Colorado corporation owned solely by Anthony F. DiAndrea. There are no parent companies or subsidiaries of Petitioner.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been officially reported. It is *Appendix A* to this Petition.

JURISDICTIONAL STATEMENT

The July 7, 1992 judgment of the United States Court of Appeals for the Tenth Circuit *(Appendix A)* reversed the judgment of the United States District Court for the District of Colorado, entered September 21, 1990, which had awarded Petitioner $25,000 in damages under Sec. 7431 of the Internal Revenue Code (26 U.S.C.) for the wrongful disclosure of tax return information *(Appendix B)*. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the Tenth Circuit Court of Appeals on September 22, 1992 *(Appendix C)*. This Court's jurisdiction rests upon 28 U.S.C. Sec. 1254.

STATUTES

26 U.S.C. Sec. 6103, CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION. The pertinent part is set forth in *Appendix D.*

26 U.S.C. Sec. 7431, DAMAGES FOR UNAUTHORIZED DISCLOSURE OF RETURNS AND RETURN INFORMATION. The pertinent part is set forth in *Appendix D*.

STATEMENT OF THE CASE

The basis for Federal jurisdiction in the court of first instance, i.e., the District Court, is Title 26, U.S.C. Sec. 7431 and Title 28, U.S.C. Sec. 1331, which states:

> The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Petitioner brought this civil action pursuant to Sec. 7431 of the Internal Revenue Code ("I.R.C.") (26 U.S.C. Sec. 7431) seeking damages from the United States for the

unauthorized disclosure of tax return information. Petitioner alleged that by mailing IRS circular letters to its customers and other third parties, an IRS agent wrongfully disclosed its confidential tax return information in violation of I.R.C. Sec. 6103. Sec. 6103(k)(6) provides, in part, that an internal revenue officer or employee may disclose return information in connection with a tax investigation if the "disclosure is necessary in obtaining information, which is not otherwise reasonably available ... ."

The alleged wrongful disclosures were made during a criminal investigation of Petitioner and its owner, Anthony F. DiAndrea ("DiAndrea")[2], concerning possible tax fraud. During the relevant years, Petitioner provided after hours janitorial services primarily to corporate customers. Petitioner typically

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[2]The spelling of Mr. DiAndrea's last name in the case caption results from a typographical error made in the original complaint.

entered into cleaning contracts with property managers of commercial office buildings, although it occasionally performed services for tenants. A typical monthly payment for Petitioner's services was in the thousands of dollars.

The IRS began auditing Petitioner and DiAndrea in July 1985. The audit remained dormant until early 1986 when a second revenue agent was assigned to the matter. The audit initially was for tax years 1983 and 1984, but was later expanded to include the 1985 year as well.

Although Petitioner's bookkeeping system was neither complex nor sophisticated, the auditing agent was unable to reconcile Petitioner's records with its tax returns. In addition, the agent perceived evidence of potential fraud: he thought DiAndrea was uncooperative during the audit; he thought there were two sets of profit and loss statements; he understood DiAndrea to say he

intentionally inflated his travel and entertainment expense deductions; and he heard from a former disgruntled bookkeeper that DiAndrea did a lot of traveling to other cities and had girlfriends in those cities. Based on these perceived badges of fraud, the agent referred the case to the IRS' Criminal Investigation Division ("CID"). At the time he referred the case to CID, the agent did not suspect - and had no reason to suspect - that Petitioner or DiAndrea was receiving unreported cash payments from customers. *(Aplt. App. at 178)*

The criminal investigation of Petitioner and DiAndrea was assigned to Shirley Kish Thomas, a CID special agent. Agent Thomas commenced her investigation by interviewing DiAndrea at his residence. During that initial interview, DiAndrea informed Agent Thomas he would like to speak with his attorney before answering further questions.

Agent Thomas was subsequently contacted by the attorney representing Petitioner and DiAndrea. The attorney requested that he and Agent Thomas discuss the feasibility of obtaining information through ways other than customer contacts which would have an adverse effect on Petitioner's business relationships. *(Aplt. App. at 28; Aplee. Supp. App. at 81)*

As part of her investigation, Agent Thomas served a summons on Petitioner and DiAndrea for all Petitioner's books and records, bank statements, deposit slips and cancelled checks, information on all bank accounts, and all financial statements for the periods under investigation. Petitioner complied with the summons and furnished all requested records. *(Aplee. Supp. App. at 6, 47)* These records were adequate to account for virtually all of Petitioner's gross receipts for the three years under investigation. *(Aplee. Supp. App. at 10, 12, 19-20)* Nevertheless,

Agent Thomas initially had trouble reconciling the records to Petitioner's returns. To assist her with the reconcilia-tion, Agent Thomas sent the records to Phoenix, Arizona, for a computer analysis.

Before receiving the results from the computer analysis, Agent Thomas prepared and mailed a "circular letter" to various third parties, most of whom were Petitioner's customers. A "circular letter" is defined as a "written request to third parties for information where more than ten letters of a similar nature are sent." *(Handbook for Special Agents, Sec. 347 (circular form letter), 347.1 (general))* Agent Thomas' "circular letter" was prepared on CID letterhead and provided in relevant part:

> The Internal Revenue Service is conducting an investigation of Metro Denver Maintenance, Inc., Lakewood, Colorado, for the years 1983 through 1985. Mr. DiAndrea is an officer of Metro Denver Maintenance whose address is 6800 West Sixth Avenue, Lakewood, Colorado 80215.

> During the course of our investigation, we noted transactions between you and Metro Denver Maintenance, Inc. and/or Mr. DiAndrea for [the] previous mentioned period. As part of our investigation, we need to verify the purpose of these transactions. Your assistance is needed in determining all payments made to or on behalf of Metro Denver Maintenance and/or Mr. DiAndrea for the previously mentioned period. We would appreciate you furnishing the information indicated on Attachment No. 1, for use in a Federal tax matter. *(Aplt. App. at 91)*

The circular letters sent by Agent Thomas included two attachments which were to be used by the addressees to furnish the requested information. Among the boiler plate language in both attachments were requests for any payments that were made in cash.[3] The circular letter itself did not request any

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[3]Attachment 1 requested the following information: "the date, check number, amount and form of all payment(s). By form of payment, it is meant if the payment(s) was made in cash, check, money order, etc." *(Aplt. App. at 94)* Attachment 2, which was a form upon which the required information was to be entered, specified that the response should include "[a]ny payments made in the form of cash." *(Id. at 95)*

information pertaining to payments made in cash.

At the time Agent Thomas mailed the circular letters: she had not yet met with Petitioner's accountant who had successfully reconciled one of the years in question; she had not received back the computer analysis of Petitioner's records; she had not served her own bank summonses and, therefore, had not completed her own analysis of the deposit items and other bank records; and she did not have any suspicion that Petitioner or DiAndrea were receiving cash payments from corporate customers or other individuals. *(Aplee. Supp. App. at 8-10, 13, 58-59, 60-61, 66; Aplt. App. at 65, 124-143, 225)*

Agent Thomas eventually received the IRS computer analysis, the various summonsed bank records, and met with Petitioner's accountant. By doing so, Agent Thomas was able to substantially reconcile the records with Petitioner's and DiAndrea's tax returns. The

additional records she obtained from the banks (well after she had mailed the circular letters) revealed DiAndrea had several money market accounts, which explained his living standard and his source of cash. The responses to the circular letters did not reveal any information regarding cash payments or any other pertinent information. Agent Thomas eventually concluded the amount of potential underreporting of income did not warrant further investigation and the case was closed. *(Aplee. Supp. App. at 58-59)*

Agent Thomas did not follow the normal IRS procedures in her investigation of Petitioner. *(Aplt. App. at 223; Aplee. Supp. App. at 24-26)* Specifically, bank statements and deposit items were not obtained or not analyzed before the circular letters were mailed. A thorough analysis of Petitioner's and DiAndrea's records was not completed prior to her mailing the circular letters. In fact, Agent Thomas

testified she never did do a comparison between Petitioner's invoices and receipt vouchers, nor did she ever do a comparison of the receipt vouchers and the bank deposits. *(Aplee. Supp. App. at 66-67)* Had the normal IRS procedures been followed, Agent Thomas would have been able to clarify any perceived inconsistencies in Petitioner's records, could have traced transfers between the various bank accounts, and could have determined that some year-end receipts were reported in the following year. *(Aplee. Supp. App. at 19-20)*

Petitioner's expert witness, Sheri Betzer, testified she did perform an analysis of Petitioner's and DiAndrea's records.[4] Ms. Betzer was able to reconcile Petitioner's gross receipts with the income reported on its returns for each year in question. Ms. Betzer

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[4]Ms. Betzer, a former IRS employee and CID special agent instructor, is well versed in criminal investigations and procedures. *(Aplee. Supp. App. at 14-16, 27)*

also reviewed Petitioner's records which were related (if at all) to the 28 recipients of the circular letters. She concluded that it was not necessary to send the circular letters to 25 of the recipients because the requested information was otherwise reasonably available. *(Aplee. Supp. App. at 21-23)* Ms. Betzer further testified that there was no evident reason to suspect either Petitioner or DiAndrea was receiving cash payments. *(Aplee. Supp. App. at 28)*

In its ruling, the District Court found that the circular letters disclosed a number of items of Petitioner's return information.[5] The disclosures included the name and address of Petitioner, that DiAndrea was an officer of Petitioner, that the IRS was investigating Petitioner, that it was a criminal investigation, and that IRS records revealed

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[5]The District Court also found that the circular letters did not disclose any of DiAndrea's personal return information.

transactions between Petitioner and the recipient of the circular letter. The District Court further found that the information that Agent Thomas sought through the use of the circular letters was reasonably available using bank and corporate records. In making this latter finding, the District Court focused on what Agent Thomas knew and what she was trying to determine when she mailed the circular letters. The District Court reasoned that should be the proper focus:

> ... because the statute says that disclosure is justified if it is necessary in obtaining information, which is not otherwise reasonably available. So we have to determine what it is that she was seeking at that point and what it is she knew at that point and what other material could have been reasonably available to her. *(Aplt. App. at 221) (Appendix B)*

The District Court rejected the Government's argument that the circular letters were necessary to obtain information

on unrecorded cash payments that may have been received by Petitioner or DiAndrea. The District Court specifically noted the absence of any evidence indicating that corporate customers were making undocumented cash payments, except for statements by a former employee that DiAndrea - not Petitioner - had large amounts of cash available to him. In addition, the District Court found that the normal IRS procedure required that CID agents first attempt to account for discrepancies in a tax return using bank records prior to sending out circular letters. Because Agent Thomas did not suspect cash payments were being received by Petitioner at the time she sent out the circular letters, the District Court concluded the Government's argument that cash payments could not be discovered through examination of the bank records was "a belated attempt to justify what the special agent was doing at the time." *(Aplt. App. at 225)*

Accordingly, the District Court ruled that the disclosures of Petitioner's return information violated Sec. 6103 and that some of the information disclosed did not result from a good faith, but erroneous, interpretation of the section. Thus, the District Court awarded damages and entered judgment in favor of Petitioner. The District Court dismissed DiAndrea's complaint because of its conclusion that the circular letters had not revealed any of DiAndrea's personal return information. *(Appendix B)*

The Government appealed the District Court's ruling with respect to Petitioner. DiAndrea did not cross-appeal the District Court's dismissal of his complaint and thus is not a party to this appeal.

The Tenth Circuit Court of Appeals reversed the judgment of the District Court and remanded with instructions to enter judgment for the United States. *(Appendix A)*

REASONS FOR GRANTING THE WRIT

I. Introduction

In our society, just the suggestion of criminal activity can be ruinous to a business or an individual. This is so whether or not an actual conviction follows. Congress passed I.R.C. Sec. 6103 to prevent such damage and to "strengthen the rights of taxpayers." *(H.R. Rep. No. 658, 94th Cong., 1st Sess. 7 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News 2897, 2902)* As stated by the Senate Committee on Finance:

> The most significant administrative purposes are those which strengthen taxpayers' rights.
>
> The Committee amendment provides definitive rules relating to the confidentiality of tax returns, an area where there has been much abuse in the past. It strictly limits disclosure from tax returns. (emphasis added) *(S. Rep. No. 938, 94th Cong., 2nd Sess., pt. 2 at 19, reprinted in 1976 U.S. Code Cong. & Admin. News at 3455)*

Petitioner brought the present action under I.R.C. Sec. 7431, which provides the exclusive remedy for unauthorized disclosures

of returns and return information. That section provides that a taxpayer may bring a civil action for damages against the United States if a federal employee or official discloses any return or return information with respect to a taxpayer in violation of any provision of I.R.C. Sec. 6103. Sec. 6103(a) prohibits the disclosure of "return information" except as otherwise authorized. Return information has been defined as including, among other things, the taxpayer's identity, whether the IRS is investigating the taxpayer, and any information the IRS obtains with respect to a return. See I.R.C. Sec. 6103(b)(2)(A). *(Appendix D)*

There are several exceptions to the confidentiality requirements of I.R.C. Sec. 6103(a). Relevant here is the exception contained in Sec. 6103(k)(6), which provides in pertinent part:

> Any internal revenue officer or employee may, in connection with his official

> duties relating to any ... criminal tax investigation or any other offense under the internal revenue laws disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amounts to be collected or with respect to the enforcement of any other provision of this title. (emphasis added)

What is disputed in the present case is whether the disclosure of Petitioner's return information by Agent Thomas fell within the exception contained in Sec. 6103(k)(6). To fall within the exception, three requirements must be met: (1) the information sought is with respect to the correct determination of tax liability (or other tax matters not relevant here); (2) the information sought is "not otherwise reasonably available;" and (3) it is necessary to make disclosures of return information in order to obtain the additional information sought. *(I.R.C. Sec. 6103(k)(6))* The Tenth Circuit Court of Appeals determined the three requirements were met. Petitioner

contends the second requirement was not met because the information Agent Thomas sought was reasonably available.

II. The Tenth Circuit's Opinion

The Tenth Circuit Court of Appeals determined potential information about cash payments, even though inadvertently sought, was not otherwise reasonably available. It stated:

> Information on receipt of undocumented cash payments was not available from any source other than from the payor, thereby meeting the second requirement. *(Appendix A at page 10)*

The District Court made no such finding. The District Court did determine what Agent Thomas was seeking and that the sought information was available from other sources. Based on the submitted evidence, the District Court concluded Agent Thomas did not seek information pertaining to cash payments, and thus it did not address the question of

whether cash payment information could be found from sources other than the payors.

The Tenth Circuit Court of Appeals' conclusion that information regarding cash payments can only be obtained from payors is contrary to the submitted evidence. The Government offered no evidence that the IRS must contact each potential payor to determine if payments were made in cash. On the other hand, Petitioner's expert witness, Sheri Betzer, testified regarding usual IRS procedures and methods of proof available to investigate information pertaining to cash payments. *(Aplee. Supp. App. at 74-80)* The conclusion which should be drawn from her testimony is that not <u>all</u> customers - let alone non-customers - would have to be contacted for information regarding cash payments because other sources of information are available. Certainly, the Tenth Circuit Court of Appeals should have given some

consideration to the addressees of the circular letters, especially considering that Agent Thomas carelessly sent some circular letters to non-customers. In any event, the Tenth Circuit should not have taken the liberty to make new factual findings not supported by any evidence.

A similar situation arose in Barrett v. United States, 795 F.2d 446 (5th Cir. 1986). In that case, the IRS agent suspected the taxpayer was receiving cash payments from customers. The agent stated that it was necessary for him to go to the patients, rather than bank records, to determine whether payments were made in cash, because "the basis of the investigation was that payments made in cash by patients were not being deposited by [the taxpayer]."[6] Id. The Court in Barrett went on to say:

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[6]In Barrett, the IRS agent's statement was in the form of an affidavit, submitted with an opposition to a motion for summary judgment.

> To the extent, therefore, that a patient's payments were deposited, they were not unreported cash payments. Thus, if [the IRS agent] had examined the patients' checks in the bank records and other deposit information, he might or might not have eliminated disclosures to many of the 350 to 400 patients. Again, a dispute of fact is raised that the District Court should properly resolve. Id.

Here, the District Court correctly focused on what information Agent Thomas sought when the circular letters were mailed, as opposed to what requests happened to be in the boiler-plate in the attachments. Focusing on what Agent Thomas sought at the time is not the equivalent of inquiring into the appropriateness or need for the information sought. Such an inquiry does not question probable cause or any other level of justification to investigate.[7] Ignoring what the agent knew at the time the circular

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[7]Contrary to the Tenth Circuit's reading of the lower court's opinion, the District Court did not conclude "insufficient justification was shown to warrant delving into whether cash payments were made".

letters were sent allows the I.R.S. to carefully compose a circular letter which in all cases will seek information not otherwise reasonably available. In fact, that was essentially done in this case. Agent Thomas mailed the then current version of the I.R.S.'s circular letter without specifically seeking information regarding cash payments. Agent Thomas inadvertently included a request for information on cash payments by including the standard attachments with her circular letter. The government then argued the circular letters were sent specifically to get cash payment information because of possible "side jobs" being performed by the taxpayers. As noted above, the District Court stated the government's argument was a "belated attempt to justify what the special agent was doing at the time". *(Aplt. App. at 225)*

The I.R.S. itself recognizes its obligation to respect the rights and

confidentiality of taxpayers and to use circular letters in limited situations. The Internal Revenue Manual, Handbook for Special Agents, warns: "if not judicially used, mail circulation may result in unwarranted embarrassment to the taxpayer". *(Id. at Sec. 347.1)*

The same manual also states:

> Care must be exercised in approving mail circulation to insure that mail inquiries are sent only to those third parties who, in the view of the Chief, Criminal Investigation Division, are a likely source of information; the information sought is important to the investigation; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons (Emphasis added). *(Id. at Sec. 347.2)*

In the present situation, the information requested in the circular letters was not important to the investigation, and not all the letters were sent to likely sources of information.

The Tenth Circuit Court of Appeals' reversing opinion unnecessarily expands the safe harbor exception contained in Sec.

6103(k)(6). Its opinion expands rather than limits disclosures. The Court in Diamond v. U.S., 944 F.2d 431 (8th Cir. 1991) stated:

> The need to minimize disclosures is particularly important when it is remembered "that our voluntary assessment system of tax action is in large measure dependent upon the realization of a taxpayer's expectation that the information required of him for this purpose would be kept confidential." Flippo v. United States, 670 F.Supp. 638, 642 (W.D.N.C. 1987) (emphasizing that Congress realized this fact when enacting section 6103); see also S. Rep. No. 938, 94th Cong., 2nd Sess., pt. 2 at 318, reprinted in 1976 U.S. Code Cong. & Admin. News 2897, 3747 (explaining that section 6103 attempts "to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment system.")

The Tenth Circuit's opinion did not balance Petitioner's right to confidentiality with the I.R.S.'s need for the information sought.

III. Reasons for Granting Certiorari

This Court's Rule 10 sets out, as a reason for granting certiorari, that a Court of Appeals has rendered a decision in conflict

with the decision of another Federal Court of Appeals on the same matter. The Rule also sets out that a United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Such is clearly the situation here.

The Tenth Circuit's opinion conflicts with the Fifth Circuit Court of Appeals' decision in Barrett, supra. The Tenth Circuit considered whether, and to what extent, I.R.C. Sec. 6103 limits the scope of an IRS investigation. It then held that IRS circular letters sent to Petitioner's customers - as well as non-customers -which inadvertently requested information on payments made in cash did not violate Sec. 6103. In contrast, the Fifth Circuit Court of Appeals reached a different conclusion. In determining whether the disclosures are both necessary and that the sought information is not otherwise reasonably available, the Fifth Circuit stated

that the court is not to determine what is a properly conducted IRS investigation nor question whether the information sought is necessary. Rather, the focus is to be on whether the disclosures are "necessary" to obtain the information sought and whether the information sought is "otherwise reasonably available." Barrett, supra. The Fifth Circuit then went on to hold that there was a violation of Sec. 6103 because information pertaining to cash payments was reasonably available from sources other than the taxpayer's customers.

Furthermore, whether the IRS can unilaterally nullify the confidentiality of tax return information by including standard boiler-plate phrases in circular letter attachments is an important question of Federal law. The Tenth Circuit opinion, which answers that question affirmatively, unnecessarily expands the safe harbor exception contained in I.R.C. Sec. 6103(k)(6).

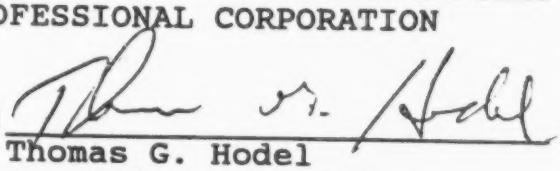
Moreover, the Tenth Circuit's sanctioning the IRS approach has broad implications to the confidentiality of all tax returns, an area where there has been much abuse in the past. The Tenth Circuit's decision expands rather than limits disclosures. It fails to balance the taxpayer's rights to privacy with the IRS' need for the information sought. Only this Court can act to bring the Tenth Circuit into conformity with other circuits and to protect the confidentiality of tax return information.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and to reverse their decision.

Respectfully submitted,

DOUSSARD HODEL MARKMAN & WELLS
PROFESSIONAL CORPORATION

By: 

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APPENDIX A

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANTHONY F. DIANDRE, Plaintiff, and METRO DENVER MAINTENANCE CLEANING, INC., Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant.	)	No. 90-1339

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 89-N-1057)

Steven W. Parks, Attorney, Tax Division, United States Department of Justice (Shirley D. Peterson, Assistant Attorney General, Gary R. Allen and Jonathan S. Cohen, Attorneys, Tax Division, United States

Department of Justice, with him on the brief), Washington, D.C., for Defendant-Appellant.

Thomas G. Hodel of Doussard Hodel & Markman, P.C., Lakewood, Colorado, for Plaintiff-Appellee.

Before MORE, ANDERSON, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

In this appeal, we consider whether, and to what extent, section 6103 of the Internal Revenue Code ("I.R.C.") (26 U.S.C. § 6103) limits the scope of an Internal Revenue Service ("IRS") investigation. We hold that IRS circular letters sent to the taxpayer's customers requesting information on all payments made to the taxpayer did not violate section 6103. Accordingly, we reverse the district court's judgment awarding damages to the taxpayer under

I.R.C. 5 7431 (26 U.S.C. § 7431) based upon an alleged violation of I.R.C. § 6103.

I .

This suit arises out of an IRS criminal investigation of a corporation, plaintiff-appellee Metro Denver Maintenance Cleaning, Inc. ("MDMCI"), and its owner, plaintiff Anthony F. DiAndrea,[1] concerning possible tax fraud. MDMCI provided janitorial services primarily to corporate customers.

In July 1985, the IRS began auditing DiAndrea and MDMCI. The investigation apparently remained dormant for some time, but resumed in early 1986. The agent assigned to the audit was unable to

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[1] The parties agree that the plaintiff's name is "DiAndrea." The spelling used in the case caption ("DiAndre") is apparently a typographical error carried over from the original complaint.

reconcile the corporation's records with its tax returns. In addition, he observed evidence of potential fraud: DiAndrea appeared to be intentionally uncooperative with the audit; there appeared to be two sets of profit and loss statements containing different figures for the same time period; DiAndrea allegedly admitted that he habitually inflated his travel and entertainment expense deductions; and DiAndrea appeared to be living beyond his means based on the income he declared on his tax returns. However, the agent did not suspect that MDMCI or DiAndrea was receiving unreported cash payments[2] from customers.

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[2] Throughout this opinion, we use the term cash payments as shorthand for any undocumented payments not cleared through DiAndrea's or MDMCI's banks. Such payments might include, for example, cash, or checks cashed at the bank from which they were drawn.

Appellant's App. at 178. On the basis of the other badges of fraud, the agent referred the case to the IRS's Criminal Investigation Division ("CID").

In September 1986, Shirley Kish Thomas, a CID Special Agent, undertook the criminal investigation of MDMCI and of DiAndrea. Agent Thomas issued a summons to DiAndrea and MDMCI for all of MDMCI's books and records, bank statements, deposit slips and cancelled checks, information on all bank accounts, and all financial statements for the period under investigation.

As part of her investigation, Agent Thomas prepared a "circular letter," a type of form letter, to obtain information from MDMCI customers. This letter, which appeared on CID letterhead, provided in relevant part:

> The Internal Revenue Service is conducting an investigation of Metro

> Denver Maintenance, Inc., Lakewood, Colorado, for the years 1983 through 1985. Mr. DiAndrea is an officer of Metro Denver Maintenance whose address is 6800 West 6th Avenue, Lakewood, Colorado, 80215.
>
> During the course of our investigation, we noted transactions between you and Metro Denver Maintenance, Inc. and/or Mr. DiAndrea for [the] previously mentioned period. As part of our investigation, we need to verify the purpose of these transactions. Your assistance is needed in determining all payments made to or on behalf of Metro Denver Maintenance and/or Mr. DiAndrea for the previously mentioned period. We would appreciate you furnishing the information indicated on Attachment 1, for use in a Federal tax matter.

Appellant's App. at 91. Attachment 1 requested the following information: "the date, check number, amount and form of all payment(s). By form of payment, it is meant if the payment(s) was made in cash, check, money order, etc." Id. at 94. Attachment 2, which was a form upon which the required information was to be entered, specified that the response should include "[a]ny

payments made in the form of cash." Id. at 95.

Agent Thomas mailed this letter to all MDMCI customers. She subsequently issued a summons to all of DiAndrea's and MDMCI's banks for all records pertaining to either of them.

Using the bank records together with the MDMCI records, Agent Thomas and an accountant were substantially able to reconcile the records with MDMCI's and DiAndrea's tax returns. In addition, the bank records revealed that DiAndrea had several money market accounts, which explained his apparent ability to live beyond his means. The responses to the circular letters failed to reveal any further pertinent information. Agent Thomas ultimately concluded that the amount of potential underreporting of income did not

meet the IRS's guidelines for criminal prosecution. The criminal investigation was then terminated.

DiAndrea and MDMCI filed suit against the United States pursuant to I.R.C. § 7431. The plaintiffs alleged that by mailing the circular letters, Agent Thomas had wrongfully disclosed confidential tax return information in violation of I.R.C. § 6103. The district court conducted a bench trial, at the end of which it orally entered its findings of fact and conclusions of law.

In its ruling, the district court found that the circular letters did not disclose any of DiAndrea's personal return information. The court found, however, that the circular letters did disclose a number of items of MDMCI's return information: the name of the taxpayer (MDMCI), the taxpayer's address, that DiAndrea was an officer of the

taxpayer, that the IRS was investigating the taxpayer, that it was a criminal investigation, and that IRS records revealed transactions between the taxpayer and the recipient of the circular letter. The court further found that certain information sought via the circular letters -- the payments cleared through DiAndrea's and MDMCI's banks -- was reasonably available using bank and corporate records. The court rejected the government's argument that the circular letters were necessary to obtain information on unrecorded cash payments that may have been received by DiAndrea or MDMCI for undocumented "side jobs." The court specifically noted the absence of any evidence indicating that customers were making undocumented cash payments, except for statements by a former employee that DiAndrea had large amounts of cash available

to him. Moreover, the court found that normal IRS procedure required that its agents first attempt to account for discrepancies in a tax return using bank records prior to sending out circular letters. Because Agent Thomas was not focusing specifically on cash payments at the time she sent out the circular letters, the court concluded that the government's argument that cash payments could not be discovered through examination of the bank records was "a belated attempt to justify what the special agent was doing at the time." Appellant's App. at 225.

The district court concluded that, in revealing MDMCI's return information, the disclosures violated section 6103 and that at least some of the information disclosed did not result from a good faith, but erroneous, interpretation of the section.

The court accordingly awarded damages and entered judgment in favor of MDMCI. Because the circular letters had revealed none of DiAndrea's personal return information, the court dismissed DiAndrea's complaint.[3]

The United States filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

The statute under which DiAndrea and MDMCI brought suit, section 7431 of the Internal Revenue Code, permits a taxpayer to bring a civil action against the United States if a federal employee or official violates that taxpayer's rights under section 6103. I.R.C. § 7431(a)(1).

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[3] DiAndrea does not cross-appeal the district court's dismissal of his complaint and is therefore not a party to this appeal.

However, section 7431 provides that the United States is not liable if the violation occurred because of "a good faith, but erroneous, interpretation of section 6103." I.R.C. § 7431(b). The government argues that no violation of section 6103 occurred. Alternatively, it argues that if a violation did occur, it resulted from a good faith, but erroneous, interpretation of the statute, and that therefore the government has no liability.

Congress enacted section 6103 of the Internal Revenue Code to protect taxpayers' privacy and to prevent the misuse of the confidential information obtained in the course of collecting taxes. See S. Rep. No. 938, 94th Cong., 2d Sess. 19, 317-18 (1976), reprinted in 1976 U.S.C.C.A.N. 3439, 3455, 3746-47. Section 6103(a)(1) provides, in relevant part:

> Returns and return information shall be confidential, and except as authorized by [the Internal Revenue Code,] no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

"Return information" is a term of art that includes, among other things, the taxpayer's identity, whether the IRS is investigating the taxpayer, and any information the IRS obtains with respect to a return. See I.R.C. § 6103(b)(2)(A).

Section 6103 provides a safe harbor for IRS agents that is relevant here:

> An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or

> with respect to the enforcement of any other provision of [the Internal Revenue Code].

I.R.C. § 6103(k)(6). Thus, an IRS agent may disclose return information during an investigation in order to obtain information, provided three requirements are met: (1) The information sought is "with respect to the correct determination of tax,, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of (the Internal Revenue Code]." I.R.C. § 6301(k)(6).[4] (2) The information sought is "not otherwise reasonably available." Id. (3) It is necessary to make disclosures of return information in order to obtain the

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[4] For the sake of brevity, we will refer to this requirement as whether the information sought relates to the determination of tax liability.

additional information sought. Id.

The parties do not dispute that Agent Thomas disclosed return information by sending out the circular letters. Whether, in doing so, she violated section 6103 depends on whether her actions fell within the safe harbor of section 6103(k)(6). Accordingly, we must determine whether the three requirements of section 6103(k)(6) were met.[5]

It should be self-evident that the first requirement -- that the information sought related to determining tax liability -- was met in this case. Information

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[5] To fall within the safe harbor of I.R.C. § 6103(k)(6), the IRS agent must also be seeking information "in connection with h[er] official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws." There is no dispute that Agent Thomas was doing so.

regarding all payments made to a taxpayer clearly relates to a determination of tax liability.

The parties dispute whether the second of these requirements was met: that the information sought must not be otherwise reasonably available. The circular letter requests information on "all payments," including those "made in cash." See Appellant's App. at 91, 94, 95. Cash payments do not appear to be the primary focus of the circular letter, but the letter clearly does request information on this subject. Information on receipt of undocumented cash payments was not available from any source other than from the payor, thereby meeting the second requirement. Although the circular letter also requested information that was potentially available from other sources, section 6103 does not

prohibit requesting additional information beyond that not otherwise reasonably available if the additional request requires no further disclosure.

The final requirement -- that the disclosures were necessary to obtain the information sought -- was also met. There is no dispute that obtaining the information sought from MDMCI's customers required disclosure of all the return information contained in the circular letter, with the possible exceptions of the taxpayer's address and the fact that the tax investigation underway was criminal in nature. With regard to the former disclosure, given the necessity of revealing the taxpayer's identity, we hold that, under the circumstances of this case, disclosure of nonsensitive public information such as a business address to aid in identification

was appropriate and necessary and therefore not a violation of section 6103. Cf. I.R.C. § 6103(b)(6) (taxpayer identity includes name, mailing address, and taxpayer's identifying number). With regard to the latter disclosure, the district court concluded that the government was protected by the good faith exception of section 7431(b). Accord Diamond v. United States, 944 F.2d 431, 435-37 (8th Cir. 1991). MDMCI does not appeal that ruling, so we do not review it here.

The district court strayed beyond the parameters of section 6103 when it sought to determine Agent Thomas, subjective intent and when it concluded that insufficient justification was shown to warrant delving into whether cash payments were made. That inquiry misperceives the function of section 6103(k)(6), which is to limit disclosures to

those necessary to obtain the information sought. The section does not require the IRS to justify the appropriateness or need for the information sought so long as such information relates to the determination of tax liability and is not otherwise reasonably available. In other words, section 6103 does not provide a vehicle to test the probable cause or any other level of justification to investigate. See Barrett v. United States, 795 F.2d 446, 451 (5th Cir. 1986) ("in a section 7431 action, the court does not inquire whether the information sought is necessary"); cf. United States v. Powell, 379 U.S. 48, 57 (1964) (IRS does not require probable cause to issue summons); United States v. MacKay, 608 F.2d 830, 832 (10th Cir. 1979) (same). The plain language of section 6103 does not limit in any way what information the IRS

may seek in the course of an investigation. Section 6103 merely imposes certain restrictions on the IRS's ability to make disclosures in seeking that information. See Barrett, 795 F.2d at 451 ("[W]e do not question the right, wisdom, or necessity of a particular IRS investigation. We do question, however, the means of investigation, but only to the limited extent consistent with section 7431."). The three requirements that section 6103(k)(6) imposes to permit an IRS agent to disclose return information were all met here. Thus, we hold that section 6103 did not prevent Agent Thomas from seeking information regarding cash payments even if she did not suspect cash payments and even if the badges of fraud could be legitimately explained.

We do not hold -- indeed, we do not mean even to imply -- that the IRS may

investigate any subject and seek any information it wishes based on mere whim, caprice, or malice. Section 6103(k)(6) permits disclosures of return information only to obtain information relating to tax liability. Whatever other limits there may be on the scope of an IRS investigation, cf., e.g., United States v. LaSalle Nat'l Bank, 437 U.S. 298, 313 (1978) ("the IRS must use its summons authority in good faith"); Powell, 379 U.S. at 58 (court may refuse to enforce summons if issued for an improper purpose such as to harass or to apply pressure in a collateral matter); United States v. Malnik, 489 F.2d 682, 686 n.4 (5th Cir.) ("enforcement of an unclear and overly broad summons would violate the Fourth Amendment's proscription of unreasonable searches and seizures"), cert. denied, 419 U.S. 826 (1974), it is not

section 6103 that imposes those limits.

Because we conclude that no violation of section 6103 occurred, we need not and do not address the government's arguments regarding a good faith, but erroneous, interpretation of section 6103.

Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to enter judgment for the United States.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-N-1057

ANTHONY F. DiANDRE and

METRO DENVER MAINTENANCE CLEANING, INC.,

Plaintiffs,

V.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial on the 19th day of September, 1990, before the Court, the Honorable Edward W. Nottingham, Judge presiding, and the trial having proceeded to conclusion and the Court having heard arguments of counsel and having made findings of fact and conclusions of law, incorporated herein by reference, it is hereby

ORDERED that the complaint and civil action of plaintiff Anthony F. DiAndre are dismissed.

IT IS FURTHER ORDERED that judgment is entered for plaintiff Metro Denver Maintenance Cleaning, Inc. and against the

defendant United States of America; that plaintiff Metro Denver Maintenance Cleaning, Inc. have and recover from the defendant the sum of twenty-five thousand dollars ($25,000.00) plus interest at the rate of 7.78% per annum from the date of this Judgment and that this plaintiff shall have its costs upon the filing of a Bill of Costs with the Clerk of this Court within 10 days of the entry of this judgment.

Dated at Denver, Colorado, this 21st day of September, 1990.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: /s/ Stephen P. Ehrilich
Stephen P. Ehrilich
Chief Deputy Clerk

Approved by the Court:

/s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge

Finally, one last point regarding the return information contained on Form 1120. Although it did not specifically reveal Mr. DiAndrea was an officer, it certainly did on the first page, because he signed as an officer. Unfortunately, the copies that have been introduced into evidence are just that, copies and not the original. But, we contend that the service center would have bounced the return had he not signed as an officer at the bottom of the return.

Therefore considering the evidence in this matter, plaintiffs contend that judgment should be granted in their favor. Thank you.

THE COURT: All matters submitted, I probably won't rule until around 4:30.

THE CLERK: When is that?

THE COURT: 4:30. The Court will be in recess until 4:30.

(Whereupon, a recess was taken off the record.)

THE CLERK: All rise. The Court is again in session.

THE COURT: All right. We are reconvened in Civil Action No. 89-N-1057, DiAndrea v. United States. This matter has been tried over the past day and a half. The Court has heard all of the evidence and the arguments and statements of council, and now enters orally it's Findings of Fact and Conclusions of Law as required by Rule 52 of the Federal Rules of Civil Procedure.

I first of all note that the parties have stipulated to many of the facts in this case in the form of a 31 paragraph stipulation of facts filed with the Court on September 17th, 1990. And without burdening the record at this point with those specific findings as to stipulated facts, I will simply say that I adopt the stipulation of facts entered into by the parties as findings of fact made by the Court.

In addition, I make the following Findings of Fact and Conclusion of Law:

The applicable portion of the Internal Revenue Code is Section 6103, which as the government's attorney has observed creates a general rule providing that returns and return information are confidential, and prohibits disclosure of such return information or returns except as

otherwise permitted by the statute or as the section says, by this title.

Section 6103 defines returns--taxpayer returns. It defines return information. And it sets forth a number of exceptions or circumstances where return or return information can be disclosed. I find that special agent Shirley Kish Thomas of the Internal Revenue Service, did disclose return information by sending the letters--the circular letters, which are Exhibits 1 through 27. Specifically, those letters disclose the identity of the taxpayer, Metro Denver

Maintenance, Inc. , Lakewood, Colorado. It discloses the taxpayer's address, 6800 West 6th Avenue, Lakewood, Colorado.

It discloses the fact that Anthony DiAndrea is an officer of Metro Denver Maintenance. It discloses that the Internal Revenue Service is conducting an investigation of Mr. DiAndrea. It discloses the fact, by virtue of the identity in the letterhead, that the investigation is being conducted by the Criminal Investigation Division of the Internal Revenue Service.

It also discloses the fact that the Internal Revenue Service records have noted transactions between the recipient of the letter and Denver Metro Maintenance, Inc. and/or Mr. DiAndrea for the three years, 1983 through 1985. It of course discloses the fact that the investigation pertains to the years 1983 through 1985.

I further find that the term disclosure is defined in Section 6103 (b) (8) as the making known to any person in any manner whatever, a return or return information. I interpret the term any person as used in that statute to mean that there is a disclosure to two separate people if the circular letter is sent to those two people. And therefore, I find that there was a disclosure in Exhibit 2 to Mr. Keith Brown, and there was a disclosure in Exhibit 2 to Mrs. Keith Brown, since the letter is sent both to Mr. and Mrs. Keith Brown.

I further find that in the 27 letters there are 28

acts of disclosure. That is to say there is an act of disclosure to each recipient of the letter including Mr. And Mrs. Brown. I do not find that there is a basis for saying that there is a disclosure concerning two taxpayers or two sets of taxpayer information. The disclosure is that the investigation concerns the taxpayer Metro Denver Maintenance, Inc. And therefore, there are, in other words, 28 acts of disclosure not 56 acts of disclosure.

The central issue in this case is whether the 28 acts of disclosure were necessary to obtain information which was not otherwise reasonably available. That is the issue which is posed by Section 6103(k)(6). And what I am required to determine therefore, is, number one, whether there was a necessary disclosure, necessary in

obtaining information and whether that information was otherwise available.

In connection with that determination, I find the following: The investigation by the lnternal Revenue Service commenced as a civil investigation of when Revenue Agent Vigil opened the case and contacted Mr. DiAndrea to determine his certain issues relating to his civil tax liability.

Mr. DiAndrea voluntarily made available to Agent Vigil, all of the records that she requested. That testimony is essentially undisputed, having come from Mr. DiAndrea. Agent Vigil looked at the information, examined the information and there passed a considerable period of time

before Mr. DiAndrea was contacted by another revenue agent from the Internal Revenue Service.

There is a considerable dispute in the evidence as to whether Mr. DiAndrea was cooperative with Revenue Agent John Zollars. I don't find it necessary to resolve that dispute. As a matter of fact, the former Agent Zollars testified that there was no cooperation and that the records were in a state of considerable disarray. Mr. DiAndrea testified that he made the records available, and instructed his bookkeeper to give the agent the information. Suffice it to say that the truth of the matter, I find, lies somewhere in between the two versions of the testimony. I don't credit either one fully.

It appears that Mr. DiAndrea was irritated with the fact that after a lapse

of time the Internal Revenue Service came back and started investigating him all over again. By his own testimony, he certainly didn't stay with the agent and try to explain all of the confusion in the books and records of the cooperation. And he didn't do anything to make sure that his bookkeeper was explaining those books and records.

In any event that is not the focus of the inquiry. The question is--or, one question is whether Mr. DiAndrea was cooperative with the special agent when the matter was finally referred to the Criminal Investigation Division.

Mr. DiAndrea of course, exercised his constitutional

rights, having been informed of those constitutional rights by the special agent in her initial contact. And I don't find that his exercise of those constitutional rights, justifies the finding of non-cooperation. What it does justify is a finding that the special agent because he was not furnishing her with information and not talking to her was forced to look to other sources of information in order to try to determine whether there were criminal violations of the Internal Revenue Code.

Having opened her investigation in the fall of 1986, the special agent determined in June of 1987, to send out the 27 circular letters, which are the focus of this litigation. It's important to focus on what the special agent knew and what she was trying to determine at that time, because the statute says that disclosure is

justified if it is necessary in obtaining information, which is not otherwise reasonably available. So we have to determine what it is that she was seeking at that point and what it is she knew at that point and what other material could have been reasonably available to her.

During the cross-examination of the plaintiff's witnesses by government counsel, I was expecting that we, would hear that she had information concerning cash payments from a confidential informer. I was expecting to hear that there was some kind of information that Mr. DiAndrea was performing

services on the side and receiving cash for those services. But, I didn't hear any of that and that wasn't the evidence.

The evidence when it finally came out from the special agent, was that she had talked to the former bookkeeper, whose name I believe was Shirley Leahy. I don't know how you pronounce it. And, that Leahy had told her that Mr. DiAndrea had large amounts of cash--seemed to have large amounts of cash. And that was all she told the special agent. And that's all I find that the special agent knew, according to the special agent's own testimony. That is to say that at the time she issued the circular letters, the special agent was aware that Mr. DiAndrea had large amounts of cash available to him.

I find that at that point in time on June 17, 1987, when the circular letters

were sent, that certain information that was sought by means of the circular letters, was reasonably available to the special agent and to the Internal Revenue Service by alternate means.

While the books and records of the taxpayer, Metro Denver, Inc., may have been somewhat disorganized, the fact remains that after a considerable period of effort, the special agent was able to examine the books and records and to match up invoices, check vouchers, and payments that were made to the corporation.

At the time she issued the circular letters, the

special agent had not examined any records obtained from any banks. Those records were not obtained until much later by means of summonses to five or six financial institutions.

I credit the testimony of the plaintiff's expert, Sheri Betzer, when she testified, that this was not regular procedure for the Internal Revenue Service. The regular procedure, even when you know that somebody has cash available is to examine the bank records to determine whether there are possible sources of that cash. For example, whether Mr. DiAndrea was depositing the checks into the bank records--into the banks and then withdrawing large sums of cash. That could have been determined from the bank records.

Similarly, the bank records could have assisted in reconciling the books and

records of the corporation with the ledgers, check vouchers. Ms. Betzer testified that she did this and in fact, I note also the testimony of the corporation's accountant who testified that he reconciled the records for 1985 and came very close to the amount that was reported on the return. He did not of course, examine the 1983 and 1984 records, because they were not available to him. Ms. Betzer did. And when she examined those 1983 and 1984 records and the services, the invoices and the contracts and receipt vouchers, she found that there were only three instances where it would have been necessary to contact the customer in order to obtain further information.

Now, I note the government's contention that bank records would not necessarily reflect payments to Mr. DiAndrea in cash that were not deposited in the bank. That is certainly true. If you don't deposit--if you take payment in cash, or if you take payment by check and don't deposit it into a bank account, then that information is not going to be reflected in the bank account. It is difficult for me to accept that contention though, as anything other than an after the fact attempt to justify what the special agent was doing in June of 1987, because in June of 1987, she didn't have the bank records. All she had was of course, the various indicia fraud that Mr. DiAndrea was apparently living beyond his means. That is his means as reflected in the tax returns that he had filed. And she also had

the information from the former bookkeeper that he had large amounts of cash.

The investigation of that information could have been undertaken at that point by initially looking at the bank records to determine whether the bank records would reveal the source of cash for Mr. DiAndrea, and to determine whether the fact that he was allegedly living beyond his means could be explained by circumstances other than his income. In otherwords, whether he had non-taxable sources of income. He testified and I credit this testimony that he had money market certificates that were available to him prior to the periods in question.

The special agent didn't investigate any of that. Instead, what she did at that point, without even trying to look at the bank records, and without even trying to determine whether those bank records would reveal a source of cash, she issued the 27 circular letters, allegedly to find out whether there were cash payments. Well, the circular letters don't ask only for cash payments, the circular letters ask for all payments.

I therefore view the government's attempt now to say, well what we were really looking for is cash payments to Mr. DiAndrea that weren't deposited into the bank as a belated attempt to justify what the special agent was doing at the time.

Of course, in any criminal investigation or even an investigation which

is not criminal, you can't use bank records to determine whether there were cash payments. But the special agent at the time was not concerned as to whether there were cash payments to Mr. DiAndrea, which were not deposited in the bank. That may have been one of her concerns, but she could have satisfied herself concerning the information, the suspicious information that she did have by first examining the bank records. And I find in interpreting (k)(6), that in looking at whether the information is otherwise reasonably available, you have to look at it from the point of view of the time at which the information was

disclosed. That is to say the time at which the circular letters were sent out. And at that point in time, the information certainly was otherwise reasonably available, through the bank records and other sources of information.

For example, if there were large cash expenditures that were being made, those cash expenditures could be investigated by means as Sheri Betzer testified, by means of looking at public records to determine whether he bought an automobile, to determine whether he bought a house with cash.

So on June 17, 1987, the information certainly was otherwise available. And I find that the government can't at this point look back on it and say, well, the information wasn't otherwise reasonably available, because what we were focusing on

we suspected cash payments at that point. There wasn't any information of cash payments. There was information that Mr. DiAndrea had large amounts of cash available to him. There was no suspicion that any of these customers were paying Mr. DiAndrea in cash. And that could have been the only basis on which the circular letters would have been sent, because the other information, non-cash information, that is checks, that were made by the customers could have been obtained from bank records. And as to the one so-called cashing out-- check that was cashed out without being deposited, that could have been followed up by contacting the single customer whose check was deposited.

There was no reason to be contacting all of these other people at that point.

In addition, I note that it is not clear that on June 17, 1987, that the special agent had the information concerning the check which had been cashed out, or whether that information was developed later in the investigation. There is also no evidence in the record from either side as to what customer that cashed out check pertained to.

I therefore find based on the testimony of Ms. Betzer, that there were only three of these people who needed to be contacted in order to get the information that the special agent was trying to get at the time. That means that there were--if you take those three customers out, there were 25 acts of disclosure where the information was otherwise reasonably available to the

Internal Revenue Service. And I find that Special Agent Shirley Kish Thomas was negligent in not trying to obtain that information, because she didn't follow what the plaintiff's expert, Ms. Betzer testified was normal IRS practice of going to the bank accounts and trying to figure out whether the bank accounts would allay any suspicion before contacting all of these customers.

I further find with respect to the necessity of disclosing the information as follows: The only information that Ms. Betzer questioned as being unnecessary to disclose, was the information concerning the relationship between Mr.

DiAndrea and Metro Denver. I don't agree with Ms. Betzer on that point. I think that given the circumstances, the fact that there were many indications of confusion between the corporation and Mr. DiAndrea, and by that I mean, Mr. DiAndrea appears to have used the corporation not strictly in the corporate form, but to transfer payments back and forth between himself and the corporation. In otherwords, he in many instances ignored the corporate veil, I find that it was necessary to disclose his relationship to the corporation in seeking this information.

I further find, however, that it was not necessary to disclose the fact that this investigation was being conducted by the Criminal Investigation Division of the Internal Revenue Service. That sort of disclosure is exactly the sort of disclosure

that creates a problem, in that the recipients of the disclosure immediately assume the worst. They assume that it is a serious criminal matter and that Mr. DiAndrea may have committed a crime, or at least that a crime is being investigated. I find there is no justification for that sort of disclosure.

The government attempts to justify that disclosure on two grounds. The first ground is that the disclosure is necessary in order to inform the recipient that this is a criminal investigation. The testimony brought out the fact that the IRS investigates conspiracies and that one or more of

the recipients might be targets and that is why that fact is disclosed.

Well, there maybe cases where it may be appropriate if in fact the recipient is a target and may be implicated in the criminal behavior where it might be appropriate to disclose to the recipient that this is a criminal investigation. This isn't such a case. There is absolutely no evidence and no indication that any of the recipients were anything other than customers. And so I believe that asserted justification for the disclosure fails on the facts of this case. As I say, there may be cases where that would be appropriate. In those sorts of cases I suspect circular letters wouldn't be sent out. The special agents if they suspected the criminal--the recipient to be involved in criminal activity might well conduct the interview themselves or use

another means of conducting the interview. In any event, that disclosure is unauthorized in this case, or unnecessary in this case.

The second asserted government reason for making that disclosure is that it is necessary to make the disclosure so that these people can reply to the proper person in the Internal Revenue Service. I find that that justification fails. I'm sure the Internal Revenue Service, by identifying Shirley Kish, Special Agent, with a Denver address, can somehow route the mail to Ms. Kish as opposed to another

special agent in either the CID or another division of the IRS. So I don't think that--the only purpose that I see for making such a disclosure in this case is to disclose the fact that there is a criminal investigation going on.

However, with respect to the disclosure of the fact that there is a criminal investigation going on, I must also reached the issue of whether the disclosure is made in good faith. The reason I have to reach that issue is that it appears that the pertinent regulation may authorize such disclosure, and also, the IRS manual for special agents seems to suggest that that is the appropriate disclosure.

I find that requiring or permitting the disclosure of a criminal investigation in each and every case as a matter of course is a good faith, but erroneous

interpretation of Section 6103. I agree with the Fifth Circuit's decision in Barrett v. United States, reported at 795 F.2d 446, where in footnote 3, the 5th Circuit says, this regulation, meaning the one that the government is relying on here obviously does not create additional exceptions that are not provided in the statute or issue authorizations that conflict with the statute. Thus the regulation can only be interpreted to authorize disclosures that are necessary to obtain information not otherwise reasonably available in a given case.

So in a given case, if the disclosure of the fact that this is being conducted by the Criminal Investigation

Division is not necessary, then the regulation is not a proper interpretation of the statute. In otherwords the regulation is too broad when it authorizes disclosure in each and every case as a matter of course without any consideration of whether that disclosure is necessary in a particular case.

However, as I said before, the regulation existed at the time that Special Agent Shirley Kish Thomas undertook the sending out of the circular letters and it seems to me and I so find that a special agent who acts pursuant to authority contained in a regulation, even though the regulation may be erroneous as applied to the facts of this case and who acts pursuant to the manuals and other materials that the IRS uses to train its special agents, is acting in good faith.

So on these facts, I must apply the statute--the portion of the statute that provides for no liability in the event of a good faith, but erroneous interpretation of Section 6103, and I find no liability on these facts for the disclosure of the fact that this investigation was being done by the Criminal Investigation Division.

I note that there is at least one District Court case in Florida and one appellate case and that circuit decision in the Barrett case, which suggests that disclosing in the body of a letter that this is a criminal investigation, or disclosing at the end of the letter that this is a criminal investigation by signing the letter as Special Agent,

Criminal Investigation Division, are unauthorized and unnecessary disclosures on the facts of those particular cases. And I find it is no different wherever you disclose the fact that this is being done by the Criminal Investigation Division. It doesn't make any difference whether that disclosure is occurring at the end of the letter under the signature block whether it occurs in the middle of the letter, or whether it is typed in as a part of the letterhead. The inference in any of those cases is that a criminal investigation is going on and it is being conducted by the Criminal Investigation Division.

On the basis of those findings, what I have found is that there were 25 unauthorized acts of disclosure, by virtue of the fact that the information was reasonably available from other sources and

in the instances where there is a question as to whether the disclosure in a specific letter was necessary, I found with respect to the relationship between Mr. DiAndrea and the corporation, that that was in fact necessary. And I have found that the disclosure of the fact that a criminal investigation was being done is a good faith--was based on a good faith, but erroneous interpretation of the statute. And therefore, the question of damages that I need to reach is damages with respect to the 25 acts of disclosure of information that was otherwise reasonably available.

With respect damages I find as follows: The

plaintiff has not proven by a preponderance of the evidence either the fact of damage or the amount of damage. With respect to the fact of damage the plaintiff has relied mainly on the tax returns that he filed for these years and on other information indicating a decline in gross receipts of the corporation.

Under Colorado Law, and I specifically sight the case of Lee v. Durango Music, and I don't have the citation because it just happens to be a case which I am familiar with, a plaintiff does not sustain the burden of proven lost profits by proving gross receipts. It has to be net receipts. In otherwords it has to be not what the business grossed, but what the business netted. And in analogizing that rule of damages to this case, there is no proof of what Mr. DiAndrea's actual take home pay was

either before the unauthorized acts of disclosure or after the unauthorized acts of disclosure. So I find that the proof of actual damages--the fact of actual damages fails.

It seems to me that the government's contention is well taken where Mr. DiAndrea is saying his income declined after the unauthorized acts of disclosure and therefore it must have been due to the unauthorized acts of disclosure. There is evidence in the form of letters from Mr. DiAndrea's customers that indicate that there may have been other reasons for a loss of a particular contract in a given case.

So the fact of damage, I think remains speculative. And more importantly, even if the fact of damages weren't speculative, the plaintiff has given me absolutely no evidence from which the amount of damages can be determined. The plaintiff's evidence in that regard can only be characterized as cavalier. Mr. DiAndrea testified that he made between $50,000 and $60,000 a year. Well that's not a very definite amount of damages. Over three years there is a difference of $30,000 in that amount.

So I find that evidence before me does not establish by a preponderance the amount of damages which I ought to award as actual damages. I note that it would have been possible in my view for the plaintiff to bring in specific customers who learned of the fact that he was having criminal problems with the IRS, by virtue of this

disclosure or by virtue of further disclosures which occurred as a result of this disclosure. And those people could have testified. They were certainly available to the fact that they were reluctant to do business with Mr. DiAndrea because the investigation created in their mind some risk of insecurity and some risk that they didn't want him to have access or his company to have access to secure areas of the buildings where his company was performing services.

That evidence was not forthcoming and I don't understand the plaintiff's asserted reason for failing to

produce that evidence, mainly that these people wouldn't come into Court and testify to that. I see absolutely no reason other than maybe they are reluctant. But, they can certainly be subpoenaed and asked why it was that they discontinued business. So, the evidence before me did not establish either the fact of damage or the amount of damage, and therefore I an unable to aware actual damages.

However, of course, Section 7431 does provide that if actual damages cannot be established, then there is $1,000 damage--statutory damage to be awarded for each act of unauthorized disclosure of a return or a return information. As I have found before there are 25 acts of unlawful disclosure here, and accordingly the appropriate damage is $25,000.

With respect to the punitive damages which plaintiff seeks, the statute is fairly clear in the way it is structured. Section 7431 provides that in any action brought under (a) of that section, that upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum, and then it says, the greater of either $1,000 or sum of actual plus punitive damages. And the structure of the statute plus the only two reported cases that have engaged in a reasoned discussion of the statute, support the proposition that punitive damages can only be awarded if actual damages are awarded.

Now, I recognize that there are two decisions that do, without discussion, award punitive damages without awarding actual damages. In otherwords, they award punitive damages where just the $1,000 statutory damages are awarded. However, those cases don't discuss the structure of the statute and they don't discuss the reasoning behind the statute.

With respect to punitive damages, I further find that such damages require an example or an instance of willful disclosure or a disclosure which is the result of gross negligence. Those terms are defined in a way which I believe to state the law. In the District Court's decision in Smith v. United States, 730 Federal Supplement 948, a 1990 decision from the Central District of Illinois, the Court there defines willful conduct as that which was done without

ground for believing it was lawful or conduct marked by a careless disregard of whether one has the right to act in such a manner. While gross negligence means either a willful act or an act performed in wanton or reckless disregard of the rights of another.

While I have found that Special Agent Shirley Kish Thomas was negligent in not following normal Internal Revenue procedures here, I do not find that she was either willful in making the disclosure or that she was grossly negligent in making the disclosure under the definition in the Smith case.

For those reasons I don't award punitive damages. I do award the costs of the action to the plaintiff as is required by the statute, Section 7431.

Accordingly, judgment will be entered in favor of the plaintiff of Metro Denver and against the defendant, The United States of America in the amount of $25,000. And the plaintiff shall also recover the costs of the action.

Is there anything further, Mr. Hodel?

MR. HODEL: Nothing from plaintiff's, Your Honor.

THE COURT: Any further findings that you think are necessary?

MR. HODEL: I don't believe so.

THE COURT: All right. Mr. Salem, anything from the government?

MR. SALEM: No, Your Honor-

THE COURT: All right. Thank you.

I have one further matter, that this matter is concluded.

(Whereupon, at 5:30 p.m., September 20, 1990, the hearing was concluded.)

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANTHONY F. DIANDRE, Plaintiff, and METRO DENVER MAINTENANCE CLEANING, INC., Plaintiff - Appellee, v. UNITED STATES OF AMERICA, Defendant - Appellant.	)	No. 90-1339

ORDER
Entered September 22, 1992

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

APPENDIX D

APPENDIX D

INTERNAL REVENUE CODE (26 U.S.C.):

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) General Rule.--Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(ii), (l)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions.--For purposes of this section--

* * * * *

(2) Return information.--The term "return information" means--

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense * * *

* * * * *

(k) Disclosure of Certain Returns and Return Information for Tax Administration Purposes.--

* * * * *

(6) Disclosure by internal revenue officers and employees for investigative purposes.--An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose

return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

* * * * *

SEC. 7431. CIVIL DAMAGES FOR UNAUTHORIZED DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) In General.--

(1) Disclosure by employee of United States.--If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

* * * * *

(b) No Liability for Good Faith but Erroneous Interpretation.--No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the

defendant shall be liable to the plaintiff in an amount equal to the sum of-

(1) the greater of--

(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of--

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

* * * * *

(e) **Return; Return Information.**--For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

* * * * *